



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. E006 OF 2020

AMRAPPELLANT

Versus

REPUBLIC RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. J. O. Alambo Resident Magistrate in Senior Principal Magistrate's Court Criminal Case No. 4 of 2018 delivered on 9/1/2019)

JUDGMENT

AMR, the appellant, was convicted for the offence of rape contrary to Section 3 (1) as read with Section 3(3) of the Sexual Offences Act by Hon. J. O. Alambo, Resident Magistrate, Kehancha, on 19/1/2018.

The particulars of the charge are that on 23/1/2018 in Kuria West Sub County, in Migori County, intentionally and unlawfully caused his penis to penetrate the vagina of EB1 by use of force.

In the alternative, he faced a charge of committing an indecent Act with an adult contrary to Section 11(A) of the Sexual Offences Act in that he touched the vagina of EB1 without her consent.

Upon conviction, the appellant was sentenced to serve ten (10) years imprisonment, less time served in remand.

Being aggrieved by the said judgment, the appellant filed this appeal based on the following grounds which are found in the petition of appeal and the submissions.

- i) That the offence of rape was not proved.**
- ii) That the appellant's right under Article 50(2) of the Constitution were breached and he did not understand the proceedings.**
- iii) That his right to fair hearing under Article 50(2) (g) of the Constitution was breached.**
- iv) That the sentence was harsh and excessive.**

The appellant therefore prays that the conviction be quashed, sentence set aside. The court directed that the appeal be canvassed by way of written submissions and the appellant filed his written submissions on 6/4/2021 which were generally a reiteration of the grounds of appeal.

Mr. Kimanthi Learned Counsel for the State filed his submissions on 9/4/2021 in which he opposed the appeal both on conviction and sentence. Counsel submitted that the appellant is the complainant's grandson, and though the incident occurred at night, the complainant had spent some time with the appellant and knew him well; that PW2 found the appellant at the scene as he begged not to be killed; that PW3 rescued the appellant from the irate members of public while PW4 found the appellant in the act of raping the complainant which evidence corroborated PW1's testimony; that PW5 confirmed that PW1 was raped and that the offence was proved beyond doubt.

Counsel however, agreed with the appellant's submission that his rights under Article 50 (2) (g) of the Constitution were violated because a perusal of the court record did not indicate anywhere that the appellant was informed of his right to choose or be represented by an Advocate which is his right to a fair hearing. Counsel relied on the decision of Mrima J in **Criminal Appeal No. 33 of 2019 Chacha Mwita =vs=**

Republic where the court ordered a retrial after it found that the appellant's right under Article 50 (2) (g) had been violated. He urged this court to order a retrial for justice to prevail.

This is a first appeal and this court has the duty to re-examine, assess and analyse all the evidence adduced in the trial court afresh and draw its own independent conclusions. The court should however bear in mind that it neither saw nor heard the witnesses testify and make due allowance for that. I am guided by the decision in **Okeno vs Republic (1972) EA 32**.

PW1 EB1 the grandmother of the appellant recalled that she was in her house cutting vegetables about 8:00 p.m. She was using a torch when the appellant went there. She refused his greetings after he spat on his hand and said he wanted to talk about his mother. It is then the appellant pulled her out of the house towards another house where he raped her as she made noise calling for help and he held her by the neck. In the process, an old man came to her rescue (PW1).

PW4 who was going to the complainant's house at about 8:30p.m when he heard a female voice asking for help. He used his torch and saw the Appellant on top of the complainant and was holding her by the neck. He made noise and the appellant who was half naked wanted to stab him with the knife he had but PW4 retreated and the appellant got a chance and ran into the maize. PW4 gave chase. People came joined the chase and arrested the appellant.

PW2 EB2 testified that on 23/1/2018 about 8:00 p.m. he heard his father M (PW4) shouting from the maize plantation that EB1 needed help and was dying. He also heard PW1 say that AMR is killing me 'ananiua' and found her in a lying position. PW2 was with one Josephat and using a torch, they surrounded the maize plantation and found the appellant shouting 'Msiniuwe' (don't kill me). They arrested and took him to Kehancha police station.

PW3 FMC recalled that on 23/1/2018, about 8:40p.m he heard screams, responded and was informed that the appellant had raped EB1 and they were trying to apprehend the appellant. He found when the appellant was already apprehended and being beaten and he called the Chief. He helped take the appellant to police station and later saw EB1 at her home with a torn skirt and torn innerwear and was muddy. He took PW1 to hospital next day.

PW5 Robi Wansu Chacha examined the complainant on 24/1/2018, and found that she had bruises to her private parts, while a high vaginal swab taken from the complainant showed the presence of blood and spermatozoa. He also recommended that the appellant be examined.

PW6 PC Mendo Nicholas of Kehancha Police Station received the appellant at Kehancha Police Station as a suspect of rape. He was the investigating officer and the complainant handed to him the clothes she had worn on the day she was raped, i.e half petticoat and panty which was torn.

When called upon to defend himself, the appellant opted for an unsworn statement. He recalled that on 22/1/2018, he came from work about 9:30p.m His grandfather called him outside the house and asked if the appellant could let him till his Shamba and plant tobacco but just then, he was surrounded by people who asked him what he was still doing there yet he was a Kisii. They started to beat him but the village elder came to rescue him. He was taken to the police station and on the second day the charges were read to him. He stated that PW1 is his grandmother; that he had asked for land to built and after he was shown, was arrested two weeks later; that he has been framed because he is not a son to PW1's son and the root cause of the dispute is that the appellant's father is unknown.

Having considered the grounds of appeal, the evidence on record and submissions of the parties, this court has to determine whether the offence of rape was committed beyond reasonable doubt. I have no doubt that there is overwhelming evidence on record that the offence of rape was committed. The appellant is a grandson to PW1. PW1 was using a torch as she cut vegetables when the appellant arrived at her house. The appellant had a conversation with PW1 before he attacked PW1 and dragged her in the maize plantation. PW4 found the appellant in the very act of raping PW1 and there was medical evidence confirming PW1 had just taken part in a sexual act because of the injuries to her private parts and presence of spermatozoa. The appellants defence was hollow. All the witnesses denied the allegations of there existing a land dispute between the family and the appellant. PW2, PW3, PW4 and PW5 all testified as to how PW1 had even defecated on herself during the act. I think that PW1 would not go to the length of putting herself in such a situation just to frame her own grandson. The defence was properly rejected.

It is necessary for the court to deal with the appellant's allegations of breach of his rights to fair trial guaranteed under Article 50(2) (g) and (m) of the Constitution. The said Article provides as follows:-

"50(2). Every person has the right to a fair trial which includes the right....

(g) to chose and be represented by an advocate, and to be informed of this right promptly.

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial."

I will start with alleged breach under Article 50((2)(m)

The appellant submitted that he is a Kisii and did not understand the language of the Court. From 25/1/2018 when plea was taken, the record indicates that the language in which the plea was read was Kiswahili. It is evident that the court did not ask the appellant nor did it record what language the appellant understood and preferred to use. That notwithstanding, the case proceeded to full hearing and at no time did the appellant ever complain that he did not understand the language of the court. The appellant cross examined the witnesses at length and also gave a detailed defence in the same Kiswahili language. I have no doubt that even if the court did not ask the appellant what language he was comfortable to proceed in or record it, he did understand the language of the court and actively participated in the proceedings. I find that his right under Article 50 (2) (m) was not infringed.

Coming to Article 50 (2)(g), the question is whether the trial court informed the appellant of his right to choose and be represented by an Advocate. I have perused the court record. The appellant appeared before the trial court for the first time for plea on 25/1/2018 when the charge was read to him. He denied the charge. Trial commenced on 28/3/2018 when the first two witnesses testified and the case proceeded to its conclusion. I have not seen on record, a record that the trial court informed the appellant of that right. Having failed to do so, the question that begs is, does that failure vitiate the whole trial?

J. Mrema dealt with a similar issue in **Chacha Mwita (supra)** where he referred to his earlier decision in **Migori Criminal Appeal 44 of 2019 N. M. T alias Aunty vs= Republic**. I will quote from the said judgment where the judge exhaustively dealt with the matter on what it means to be informed of the right to choose an advocate, at what stage the accused should be informed of the right and when supposed to inform the accused of that right. The Judge stated as follows:-

14. That being the record the question which now begs an answer is what entails the right as provided in Article 50(2)(g) of the Constitution. The reading of the said provision avails that an accused person must be promptly informed of the right to choose to be represented by an Advocate. Since the Constitution does not define the word 'choose' I will make reference to the Tenth Edition of the Black's Law Dictionary on how the said word is defined. The said Dictionary does not expressly define the word 'choose or choice' but refers one to 'Freedom of Choice' (See page 294 thereof). At page 779 the Dictionary defines 'freedom' as follows: -

i. The quality, state or condition of being free or liberated esp. the right to do what one wants without being controlled or restricted by anyone.

15. The Dictionary further defines 'Freedom of Choice' as 'the liberty embodied in the exercise of one's right'. The Second Edition of the Law Dictionary has the following to say about the 'Freedom of Choice': -

Unfettered right to do what one wants, when one wants as one wants, except where it infringes or prevents another from doing what that one wants, and do so on. Also excluded is doing something that would harm one's self or another.

16. To choose hence connotes options and discretion. When one is called upon to make a choice it must mean that the person has been availed with options upon which he/she may exercise his/her discretion. The right to choose an Advocate of one's choice as embodied in Article 50(2)(g) of the Constitution therefore means that for an accused person to exercise that right he/she must be certainly told of the right to legal representation by an Advocate of one's choice and any other attendant information be availed accordingly to be able to make a choice on whether he/she requires any legal representation.

17. The right under Article 50(2)(g) of the Constitution must be distinguished from the right under Article 50(2)(h) of the Constitution given that in many instances the rights under Article 50(2)(g) and (h) of the Constitution are dealt with contemporaneously. The right under Article 50(2)(h) of the Constitution on one hand places a duty on the State to assign an Advocate to an accused person at its own expense if substantial injustice will otherwise result. The right under Article 50(2)(g) of the Constitution on the other hand deals with informing an accused person of his/her right to be represented by an Advocate of one's choice further to giving necessary information to the accused person and calling him/her to make a choice on his/her legal representation. Put differently, the right under Article 50(2)(h) of the Constitution deals with instances where the State must assign an Advocate to an accused person. Suffice it to say that the right to a fair trial under Article 50 of the Constitution is among those rights that cannot be limited in any way whatsoever courtesy of Article 25 of the Constitution.

18. Courts have dealt with the need to avail such information to an accused person to enable him/her make a choice on legal representation. In Pett vs. Greyhound Racing Association (1968) 2 All ER 545 Lord Denning presented himself thus: -

It is not every man who has the ability to represent himself on his own. He cannot bring out the point in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A Magistrate says to a man; 'you can ask any questions you like;' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task.

19. In South Africa in Fraser vs. ABSA Bank Limited (66/05) (2006) ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) the Constitutional Court had the following to say: -

Without the recognition of the right to legal representation in section 26(6), the scheme of restraint embodied in POCA might well have been unconstitutional. However, the right embodied in section 35(3)(f) of the Constitution does not mean that an accused is entitled to the legal services of any counsel he or she chooses, regardless of his or her financial situation....

20. In Kenya, the Supreme Court in Petition No. 5 of 2015 Republic -vs- Karisa Chengo & 2 Others [2017] eKLR while dealing with various aspects of the right to a fair hearing under Article 50 of the Constitution stated as follows: -

the right to legal representation.....under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more.

21. Apart from the Constitution and the foregone judicial decisions there is The International Convention on Civil and Political Rights (ICCPR) which Kenya is a party after adopting it on 16th December 1966. Article 14(3)(d) thereof entitles an accused person of the following rights: -

To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

22. Having settled the need to inform an accused person of the right to legal representation under Article 50(2)(g) of the Constitution, the next limb of consideration must be who is under such a duty to inform the accused person of the right. The answer seems to be in one of our legislations. The Legal Aid Act No. 6 of 2016 (hereinafter referred to as 'the Act') is an Act of Parliament to give effect to Articles 19(2), 48, 50(2)(g) and (h) of the Constitution. Section 43(1)(a) of the Act which provides one of the duties of the court as follows: -

43.(1) A court before which an unrepresented accused person is presented shall-

(a) promptly inform the accused of his or her right to legal representation;

23. Still on the said subject, a South African Court in S -vs- Daniels & Another 1983(3) 275(A) at 299 G-H, while emphasizing that the duty to inform the accused person squarely lies on the court stated that: -

... the accused's rights were explained to him, must appear from the record, in such a manner as, and with sufficient particularity, to enable a judgment to be made as to the adequacy of the explanation

24. Further, another South African Court in Mphukwa v S (CA&R 360/2004) [2012] ZAECGHC 6 (16 February 2012), made reference to the comments of Goldstone J. in S v Radebe; S v Mbonani 1988(1) SA 191 (TPD), a decision which was quoted with approval by the Supreme Court of Appeal of South Africa in Ramaite -vs- The State (958/13) [2014] (26 September 2014). My Lordship Goldstone, J. stated as follows: -

...a general duty on the part of judicial officers to ensure that unrepresented accused fully understand their rights and the recognition that in the absence of such understanding a fair and just trial may not take place.

If there is a duty upon judicial officers to inform unrepresented accused of their legal rights, then I can conceive of no reason why the right to legal representation should not be one of them. Especially where the charge is a serious one which may merit a sentence which could be materially prejudicial to the accused, such an accused should be informed of the seriousness of the charge and of the possible consequences of a conviction. Again, depending upon the complexity of the charge, or of the legal rules relating thereto, and the seriousness thereof, an accused should not only be told of this right but he should be encouraged to exercise it. He should also be informed in appropriate cases that he is entitled to apply to the Legal Aid Board for assistance. A failure on the part of a judicial officer to do this, having regard to the circumstances of a particular case, may result in an unfair trial in which there may well be a complete failure of justice ...

25. In Kenya, Nyakundi, J. in Joseph Kiema Philip vs. Republic (2019) eKLR added his voice on the subject in the following manner: -

.....it is paramount that the record of the trial court should demonstrate that the accused was informed of his right to legal representation and whether or not in the case that he cannot afford an advocate, one may be appointed at the expense of the state. It [the court record] must show that the court did take the profile of the accused person before the trial commenced.....

26. From the foregone I believe I have said enough regarding the duty of a court to inform an accused person of the right under Article 50(2)(g) of the Constitution.

27. That now leads to the other question as to what point in time should the right be explained to the accused person.

28. Article 50(2)(g) of the Constitution dictates that the accused person must be informed of the right to legal representation promptly. In rightly answering the question Nyakundi, J. in Joseph Kiema Philip (supra) stated as follows: -

... The earliest opportunity therefore should be at the time of plea taking; the first appearance before plea is taken or at the commencement of the proceedings, that is at the first hearings... (emphasis added).

29. I must emphasize that the accused person must be informed of this right immediately he/she appears before a court on the first appearance regardless of whether the plea would be taken at that point in time or later. Of importance is the emphasis that since the court speaks through the record then the record must be as clear as possible and ought to capture the entire conversation between the court and an accused person. A court should therefore not be in a hurry to take the plea before ascertaining that it has fully complied with Article 50(2)(g) of the Constitution among others as required. Circumstances calling, a court should boldly postpone the plea-taking until satisfied that the court has fully complied with the law.

30. In this case the trial court explained the right to representation to the Appellant at defence stage. That was too far late in the day.

31. Having dealt with the various limbs of the right under Article 50(2)(g) of the Constitution and in view of the status of the record as espoused hereinabove I must return the verdict that the trial court failed to comply with the dictates of Article 50(2)(g)

of the Constitution. The Appellant was hence not accorded a fair trial in line with Article 50(2)(g) of the Constitution.

32.

33.

34. **Having said so, the inevitable question that now follows is: What is the effect of the derogation of the right under Article 50(2)(g) of the Constitution in the circumstances of this case?**

35. **There are two schools of thought on the issue. The first school fronts the position that once the derogation of the right is confirmed then the entire proceedings, judgment and sentence before the trial court are vitiated and stand null and void ab initio. The other school fronts the position that failure to inform an accused person of his/her right to legal representation does not necessarily have the effect of vitiating the proceedings in a criminal trial unless it is proved that substantial prejudice to the accused person or a miscarriage of justice was occasioned.**

36. **In answering the question, I will consider the wording of the Article 50(2)(g) and (h) of the Constitution. From the wording of Article 50(2)(h) the right therein is not absolute as the court must first satisfy itself that substantial injustice may result before it enforces the right. However, that is not the position under Article 50(2)(g) where the right is not qualified. Since that is what the People of Kenya wanted and so settled it in the Constitution then it remains the unwavering duty of this Court to enforce the provisions of the Constitution.**

37. **I therefore fully associate myself with the school which fronts the position that upon proof of derogation of the right under Article 50(2)(g) of the Constitution then the trial is rendered a nullity. Qualifying the provisions of Article 50(2)(g) of the Constitution will be tantamount to amending the Constitution through a back door, an act which this Court must frown at. It may appear like the position is harsh and is likely to fan multiple applications and appeals, but I must say that unless Courts, as custodians of justice and the Rule of Law, are prepared to enforce the Constitution as it is the intentions of the People of Kenya as expressed in the Constitution will never be realized. I therefore find and hold that the entire proceedings, judgment and sentence before the trial court are a nullity and cannot stand in law.**

I totally agree with the J. Mrima.

In the end, I find that the appellants right to be promptly informed of the right to choose an advocate was infringed and that renders the whole proceedings a nullity. The question then is how should this court proceed? Should the court dismiss this case or order a retrial. There are numerous decisions which give guidance on when a court can order a retrial. In **Ahmed Sumar =vs= R (1964)EALR 483**, the Court of Appeal said

“.....in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiently of evidence or for the purposes of enabling the prosecution to fill up the gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessary follow that a retrial should be ordered In this judgment the court accepted that a retrial should not be ordered unless the court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case depends on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person.”

This decision was echoed in **Lolimo Ekimat vs Republic Criminal Appeal No. 151 of 2004 KLR 552**. In **Fatehali Manji =vs= Republic (1966)EA 343**, the courts expressed itself thus:-

Although some factors may be considered such as illegalities or defects in the original trial, the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution’s making or not; whether on a proper consideration of the admissible or potentially admissible evidence, a conviction might result from a retrial at the end of the day, such a case must depend on its own particular facts and circumstances and an order for a retrial should only be made where the interests of justice require it.”

In the instant case, the offence was committed on 23/1/2018 and the appellant was convicted on 9/1/2019. So far, he has served about 2 ½ years. The complainant was the appellants grandmother and will not be hard to trace. The other witnesses were relatives and neighbours of both the complainant and appellant and are easily traceable. The offence committed is a very serious one and carries a sentence of life imprisonment. The circumstances under which it was committed greatly affected the complainant. I find that this is a case that is suitable for a retrial and I hereby order that a retrial be undertaken.

In the end, I allow the appeal, quash the conviction, set aside the sentence on the grounds that the appellant’s right to fair trial under Article 50(2)(g) of the constitution were infringed. I direct that this matter be referred back to Kehancha Court for a retrial. The Principal Magistrate Kehancha Law Courts to take plea and to ensure the fastrack of the case. The appellant is released to police custody to be produced before Principal Magistrate Kehancha on 21st June, 2021 for taking plea.

It is so ordered.

DELIVERED, DATED and SIGNED at MIGORI this 16th day of June, 2021.

R. WENDOH

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Kimanthi for State Counsel

Ms Nyauke court assistant

Appellant present in person